BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GORDON A. AND ZELDA ROGERS)

Appearances:

For Appellants: Sheldon S. Baker
Attorney at Law

For Respondent: James W. Hamilton
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Gordon A. and Zelda Rogers against proposed assessments of additional personal income tax against Gordon A. and Zelda Rogers, jointly, in the amounts of $731.23 and $3,114.02 for the years ended on June 30, 1959 and 1960, respectively, and against Gordon A. Rogers, individually, in the amounts of $482.53 and $214.26 for the years ended on June 30, 1962 and 1963, respectively.

Appellant Gordon A, Rogers is the sole shareholder of Broadcasters of Eurbank, Inc,, hereafter referred to as "Broadcasters," which is engaged in the radio broadcasting business. In January of 1959 this corporation sold, on the installment basis, an 80 percent undivided interest in all the assets used by it In its operation of radio station KBLA. At about the same *time* appellant decided to expand the operations of Broadcasters by acquiring new stations. At the hearing of this matter appellant stated that because of federal' and foreign licensing restrictions he decided to first acquire the stations personally or through a nominee, and at the earliest possible time transfer them to the corporation. To finance the acquisition and early operation of these stations appellant decided to use both personal funds and the funds. being received by Broadcasters from the sale of the 80 percent undivided interest in KBLA's assets.

Station XEMO in Mexico was acquired in the name of Robert Marshall, an employee and vice president of Broadcasters. On November 18, 1958, a "Loan and Security Agreement" was executed by Marshall and the corporation to cover an original amount of $21,600 supplied by Broadcasters. The agreement, as modified by appellant's letter of the same date, stated certain payment and interest terms, and stated that repayments need only be made out of profits earned by XEMO. This same repayment provision was to apply to future monies supplied to Marshall. Title to XEMO, when acquired by Marshall, was to be assigned to the corporation as security. At the hearing of this matter Marshall stated that he had no permanent right to XEMO, and was holding it only until a transfer could be made to Broadcasters, XEMO was operated by Broadcasters' employees until April 1, 1960, when it was destroyed by fire. At this time Marshall had not acquired title to the station. In its return for the income year ended June 30, 1961, Broadcasters took a bad debt deduction of $33,700 for the loans made to Marshall.

Station KGAR in Portland, Oregon was acquired by appellant in his own name. Although some of Broadcasters* installment proceeds from the KBLA asset sale were used for the purchase and operation of this station, no promissory notes were executed by appellant. At the hearing of this matter appellant stated that KGAR is just presently reaching a profitable stage.

The funds supplied by Broadcasters for the purchase and operation of the above stations totalled $23,010.82, $54,005.81, $9,613.46, and $6,181.02 for the years ended on June 30, 1959, 1960, 1962, and 1963, respectively. The corporation recorded. these amounts on its books as loans to Marshall and appellant. No repayments have been made, nor has the remaining station, KGAR, been transferred to Broadcasters, The installment sale proceeds received by the corporation were its primary sources of income over the years in question, No dividends were formally declared by Broadcasters during this period.

Respondent has determined that the funds of Broadcasters, used to purchase and operate XEMO and KGAR, were in fact distributions of corporate earnings to appellant and therefore were includible in his income as dividends under section 17071 of the Revenue and Taxation Code. Whe ther this determination is correct is the sole issue of this case.

Respondent% determination that the transfer of funds was dividend income to appellant is presumptively correct, and appellant has the burden of proving it erroneous. (Gurtman v. United States. 237 F. Supp. 533.) To carry this burden appellant, the sole shareholder, must prove that he had an

intention at the time of the transfer of the funds to use them solely for the corporation's business. (Nasser v. United States, 257 F. Supp. 443.) In attempting to ascertain appellant's intention at the time of the transfer, both contemporaneous and subsequent evidence must be considered. (Nasser v. United States, supra.) Where the transfer is to a person in substantial control of the corporation, careful scrutiny of the transaction is demanded. (Appeal of Goodwin D. and Bessie M. Key, Cal. St. Bd. of Equal., Dec. 15, 1966.)

In the instant situation appellant, the sole shareholder of Broadcasters, withdrew funds from the corporation so that assets could be purchased in both his and in an employee's names. Appellant has stated that this procedure was necessary to avoid licensing restrictions which could have hindered his expansion plans. Assuming that at the time appellant was developing his expansion plans, approximately 1960, his personal retention of the stations was consistent with an intention to use the transferred funds solely for corporate purposes, appellant has not explained why station KGAR was not transferred to the corporation at a later date. The evidence submitted indicates that this station was still in appellant's name at the time of the hearing of this matter, January 23, 1768. Title to station XEMO was not acquired by Marshall before the fire in April of 1760. However, considering the retention of KGAR by appellant, it is difficult to conclude that XEMO would have been treated differently. The unexplained personal retention by appellant of the Oregon station severely detracts from an inference that appellant's intention was to use the transferred funds solely for the corporate business.

Appellant contends that this case is controlled by Nasser v. United States, supra, There, the sole shareholder used personal, corporate? and borrowed funds to purchase a market, which was taken in his own name. He explained that this procedure facilitated both negotiations and financing. However, in sharp contrast with the instant situation, the shareholder transferred an undivided 2/5 interest in the market to the corporation within one year, Even this delay was explained to the satisfaction of the district court. (See also Joseph McReynolds, 17 B.T.A. 331.)

We conclude that appellant has not carried his burden of proving that his intention at the time of the transfer of the corporate funds was to use the money solely for the corporate business. Therefore respondent's determination that these funds were dividend income to appellant must be upheld.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Gordon A. and 'Zelda Rogers against proposed assessments of additional personal income tax against Gordon A. and Zelda Rogers, jointly, in the amounts of $731.23 and $3,114.02 for the years ended on June 30, 1959 and 1960, respectively, and against Gordon A. Rogers, individually, in the-amounts of $482.53 and $214.26 for the years ended-on June 30, 1962 and 1963, respectively, be and the same is hereby sustained.

Done at Sacramento,,, California, this 7th day of May , 1968, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____ Member

ATTEST: _____, Secretary